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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. YALE AARONS FISHER, Defendant and Appellant.	B153937 (Los Angeles County Super. Ct. No. BA133500)

APPEAL from a judgment of the Superior Court of Los Angeles County. James A. Albracht, Judge. Affirmed.

Schonbrun DeSimone Seplow Harris & Hoffman, Paul L. Hoffman and Michael S. Morrison for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Stephen A. McEwen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Yale Aarons Fisher appeals from a judgment following a jury trial in which he was convicted of presenting multiple claims to more than one insurer for the same loss or injury with an intent to defraud in violation of Penal Code section 550, subdivision (a)(2). Defendant contends: (1) the evidence is insufficient to support findings he presented multiple claims or had an intent to defraud; (2) the trial court misinstructed the jury; (3) the prosecutor engaged in prejudicial misconduct; (4) the trial court erred in admitting communications protected by the psychotherapist-patient privilege; and (5) the trial court erred in awarding the insurance company restitution in the amount of $100,000 for its costs of investigating the fraud. We affirm.

PROCEDURAL BACKGROUND

Defendant was charged with 12 counts of insurance fraud, grand theft, and money laundering arising out of insurance claims for 1994 earthquake damage to his Beverly Hills residence, 1995 water damage to his Beverly Hills residence, and psychiatric disability. The jury acquitted defendant of 10 counts. It was unable to reach a verdict on count 12, insurance fraud in violation of Penal Code section 550, subdivision (a)(1) in connection with the disability claim. The jury convicted defendant of count 5, presenting claims under both his homeowner's insurance policy and the general contractor's liability policy for the same 1995 water damage to his residence with an intent to defraud. A mistrial was declared as to count 12, and the count was later dismissed on motion of the prosecution pursuant to Penal Code section 1385.

Defendant made three motions for new trial. The trial court denied the first two motions, but granted the third. The prosecution appealed. On September 11, 2000, we reversed the order granting a new trial on the ground the trial court was without jurisdiction to grant a new trial motion after it had previously denied a new trial motion. We remanded the matter to the trial court for sentencing (B133761). The trial court imposed a probationary sentence. Defendant appealed.

FACTS

As noted previously, defendant was convicted of insurance fraud only in connection with the presentation of multiple insurance claims for 1995 water damage to his Beverly Hills residence. However, much of the evidence presented as to the other 11 counts is relevant to count 5. We recount the evidence relating to the other 11 counts to the extent it is relevant to the issues on appeal.

In 1988, defendant purchased a new home in Beverly Hills from Albert Levolie. The house had been built by general contractor Eric Fishburn. Defendant required $10,000 of improvements and repairs to be made to the house before the close of escrow. Fishburn made the improvements and repairs. Escrow closed. Levolie refused to pay Fishburn for his work. Fishburn placed a mechanics lien on the residence and informed defendant. Defendant persuaded Fishburn to remove the lien.

The four-story house included four projected decks with clay tiles in a mortar bed over an elastomeric waterproof membrane over plywood. The deck design included drainage and flashing. The decks were above rooms of the house. In 1989, defendant contacted Fishburn concerning a leak from one of the decks. Fishburn repaired the leak. Fishburn again repaired leaks from the decks in 1990.

In 1990, defendant submitted a claim to Fireman's Fund under his homeowner's insurance for damage to a picture, a table, and a decorative scale. Fireman's Fund paid defendant $4,550. In 1991, defendant submitted a claim to Fireman's Fund under his homeowner's insurance for cracking damage to his pool deck. Fireman's Fund denied this claim. In 1992, defendant submitted a claim to Fireman's Fund under his homeowner's insurance for paint damage to his carpet. Fireman's Fund paid defendant $29,856 to replace all of his carpet (496 sq. yds. @ $61/ sq. yd.). The carpet was not replaced. In February 1993, defendant submitted a claim to State Farm under his homeowner's insurance for wind and rain damage. State Farm paid defendant $6,967.70. In May 1993, defendant applied for homeowner's insurance with Kemper. Defendant

disclosed the 1993 State Farm wind and rain damage claim, but did not disclose the 1990, 1991, and 1992 claims made to Fireman's Fund. Kemper became defendant's homeowner's insurance carrier in May 1993. The policy was a replacement value policy. Defendant was to receive the replacement value for damaged property, but only if he replaced the damaged property.

The Northridge earthquake occurred on January 17, 1994. Shortly thereafter, defendant contacted Fishburn, who inspected the house. The earthquake appeared to Fishburn to have caused only minor damage, including the loss of a few roof tiles and some cracking of plaster. Initially, defendant made no complaints to Fishburn after the earthquake. However, heavy rains followed the earthquake, causing water damage to the house from the decks. Defendant told Fishburn the water damage was the result of faulty construction of the decks and demanded that Fishburn repair the decks and the consequential water damage. Between the spring of 1994 and the spring of 1995, Fishburn and his employees repaired the chimney plaster and roof trim, adjusted doors, replaced weather stripping, painted, and repaired the decks. This work was done at no charge to defendant.

In the meantime, defendant presented a claim to Kemper for his earthquake damage. The claim included cracks in the masonry surrounding the house and the chimney, cracked ceiling beams, water damage, and damage to personal belongings. Defendant told a representative of Kemper that there had been no trouble with leaks in the house prior to the earthquake. Kemper paid defendant $464,000 on the claim, including: $48,111 for scheduled fine art and contents; $290,000 for damage to the house, including the beams; $60,000 for rental replacement; and $26,000 for 430 square yards of carpet out of a total carpet of 496 square yards. The beams were not repaired and the carpet was again not replaced. Defendant deposited the checks in his bank account without obtaining the approval of his mortgage company to not make the repairs.

In January 1995, heavy rains fell again. Defendant again contacted Fishburn and complained about the leaky decks. Fishburn sent his employees to the house to erect

temporary plastic canopies. Fishburn decided the elastomeric waterproof membrane had failed and decided to remove and replace the tiles over traditional "hot mopping." Once again, there was evidence of water damage in the house. Fishburn undertook to repair the water damage. Defendant presented a list of personal items damaged by water, which he wished replaced by Fishburn's insurance company. Fishburn submitted the list to his liability insurance carrier, Alpine Insurance Company. Alpine, through its claims administrator, TCO Insurance Services, processed the claim by sending an independent adjustor to speak with defendant. On February 9, 1995, the adjustor spoke to defendant at the house. Defendant claimed the decks had been defectively constructed. Defendant assured the adjuster that he had not made a claim against his homeowner's insurance and did not intend to make a claim. Defendant refused to tell the adjuster the name of his homeowner's insurance carrier.

Defendant contacted Glen Ashbaugh, an unlicensed contractor, to prepare an estimate for the 1995 water damage. Ashbaugh prepared an inflated estimate of damage of more than $200,000. In January 1995, defendant presented a claim for water damage to Kemper, supported by the Ashbaugh estimate. The claim for consequential damage was virtually identical with the claim presented to Alpine. Defendant told Kemper Ashbaugh was a licensed contractor, even though defendant knew that he was not. Part of the claim was for replacement of carpet that had been previously paid for by insurance proceeds, but not replaced, in connection with the 1994 earthquake claim. Kemper thought that perhaps the leaky decks were due to faulty construction and asked defendant to give it the name of the general contractor, who had built the house. Defendant told various representatives of Kemper that he did not know who had built the house, had not been in contact with the builder since he bought the house, and the builder was out of business. He told Kemper he had paid some day laborers to erect the temporary plastic canopies. Kemper determined that Fishburn was the contractor and contacted him. Defendant told Kemper the house had suffered no previous water damage. Kemper discovered the previous earthquake claim. Kemper told defendant it wished to conduct

destructive testing of the deck to determine fault. Defendant had Fishburn repair the deck before Kemper's destructive testing took place. Much of the claimed 1995 water damage was the same as the damage in the 1994 earthquake claim, which Kemper had paid.

At this point, Kemper became concerned that defendant was engaged in fraud, referred the matter to its fraud unit, notified the State Fraud Bureau, and conducted a fraud investigation. Defendant told Kemper that there was no other insurance available for his damages. Kemper discovered the claim presented to Alpine under Fishburn's liability policy. In October 1995, Kemper denied the 1995 water damage claim for fraud. Alpine also did not pay the claim. The matter was referred to the district attorney for criminal prosecution.

Defendant was terminated by Bank of America in April 1994. In July 1995, defendant filed a claim for psychiatric disability (clinical depression) with Provident Insurance Company. The claim was retroactive to May 1994. The claim was supported by reports of defendant's treating psychiatrist, Dr. Franklin Rudnick. Provident commenced monthly disability payments in the amount of $15,000, effective in mid-1995. Provident became suspicious of defendant's disability claim and exercised its right to have defendant examined by two independent medical examiners. Defendant was tested and examined by psychologist, Dr. Ted Evans in January 1997. Defendant was examined by psychiatrist, Dr. Lawrence Moss also in January 1997. Both independent medical examiners opined that defendant was not suffering from clinical depression and was malingering. Provident ceased the monthly disability payments.

DISCUSSION

I. Sufficiency of the Evidence

A. Standard of Review

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

B. Presentation of Multiple Claims

Defendant contends the evidence is insufficient to support a finding he presented multiple claims for the same loss to multiple insurers.[1] He concedes he presented a claim to Kemper, his homeowner's insurance carrier. He argues he did not present a claim to Alpine, the general contractor's liability insurer. We are not persuaded by this contention.

Penal Code section 550, subdivision (a)(2) provides: "It is unlawful to . . . [k]nowingly present multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, with an intent to defraud." "The word 'claim' is one of common meaning and is defined by Webster's International Dictionary, Second Edition, unabridged, as follows: 'To ask for, or seek to obtain, by . . . right, or supposed right; to demand as due.' It is to be assumed that the Legislature in using the word 'claim' intended it to have its common meaning and intended to proscribe the presentment of any false demand under a policy of insurance irrespective of the form of that demand." (*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 212.) A written proof of loss submitted in support of an insurance claim is a claim. (*Ibid*.) An itemized inventory delivered to the adjustor for multiple insurers is a claim. (*Ibid*.) A third party claim is a claim. (*People v. Benson* (1962) 206 Cal.App.2d 519, 532-534, disapproved on another ground in *People v. Perez* (1965) 62 Cal.2d 769, 776.) A claim may be presented through another person. (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1368-1369, citing *Smith v. Superior Court* (1970) 5 Cal.App.3d 260, 263-264 [Pen. Code, § 72, presentation of false claim to state agency].)

In this case, defendant gave a list of his water damages to Fishburn for presentation to Fishburn's liability insurer. Defendant intended that Fishburn present the claim to the insurer and knew he would present the claim. Defendant also knew that, if

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[1] Defendant characterizes this as a legal issue.

the claim was approved, he would be paid by Alpine for the claim. Defendant's ultimate objective was that the claim be presented to Alpine and paid by Alpine. In this respect, Fishburn simply acted as a conduit for defendant's third party claim, and defendant cannot escape responsibility by hiding behind Fishburn. In addition, defendant directly presented his claim to two adjustors representing Alpine. In February 1995, defendant met with an Alpine adjustor at his house and pointed out the water damage on a tour of the house. In August 1995, defendant met with a second Alpine adjustor and provided her with a signed statement regarding the water damage. Substantial evidence supports the finding defendant presented a claim to Alpine. (See *People v. Grossman* (1938) 28 Cal.App.2d 193, 203.)

Defendant argues that this interpretation of subdivision (a)(2) of the Penal Code is inconsistent with the language of other subdivisions. Subdivision (a)(2) refers only to "present" while subdivision (a)(1) refers to both "present" and "cause to be presented." We disagree. First, subdivision (a)(1) is the only subdivision that applies to multiple claims made to multiple insurers and so it is the only subdivision with which we are concerned. The language of other subdivisions is not relevant to the language of this subdivision. Second, the fact that subdivision (a)(1) contains the language "present or cause to be presented" does not mean that under subdivision (a)(2) defendant was required to personally present the claim to Alpine. The phrase "cause to be presented" has been broadly interpreted to include the submission of fraudulent chiropractor billings to attorneys for personal injury claimants to be forwarded to insurers. (*People v. Singh, supra,* 37 Cal.App.4th at pp. 1369-1370.) "Cause to be presented" means intentionally acting "to cause another to present a fraudulent claim." (*Id*. at p. 1370.) Here, Fishburn did not present multiple claims, he simply acted as a conduit for one of defendant's multiple claims. In any event, even if the presentation of the claim through Fishburn did not constitute the presentation of a claim, defendant's subsequent direct dealings with Alpine's adjustors constituted a demand for payment of the water damages under the

liability insurance. It is of no moment that the adjustors contacted defendant, rather than defendant contacting the adjustors. Defendant set in motion the entire claim process.

C. Intent to Defraud

Defendant contends the evidence is insufficient to support a finding he intended to defraud Kemper and/or Alpine. We disagree.

"An intent to defraud is an intent to deceive another person for the purpose of gaining some material advantage over that person or to induce that person to part with property or to alter that person's position to its injury or risk, and to accomplish that purpose by some false statement, false representation of fact, wrongful concealment or suppression of truth, or by any other artifice or act designed to deceive." (CALJIC No. 15.26.) It is not necessary that the person intended to be defrauded actually suffer a loss. "'"Intent to defraud is an intent to commit a fraud." [Citation.] '"Fraud"' and 'dishonesty' are closely synonymous. Fraud is defined as 'a dishonest stratagem.' [Citation.] It 'may consist in the misrepresentation or the concealment of material facts' [citation], or a statement of fact made with 'conscious[ness] of [its] falsity.' [Citation.]" [Citation.]'" (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1253.)

"'Intent cannot always be proved by direct evidence. Many times it has to be determined from a consideration of all the circumstances surrounding the doing of an act.'" (*People v. Benson, supra,* 206 Cal.App.2d at p. 529; see also *People v. Singh, supra,* 37 Cal.App.4th at p. 1371.)

Intent to defraud is established where the insured knows he is lying to the insurer and does so with the intent that the insurer not discover the actual facts. (*Cummings v. Fire Ins. Exchange* (1988) 202 Cal.App.3d 1407, 1417-1418; *People v. Booth, supra,* 48 Cal.App.4th at p. 1254, fn. 3; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 279.) An insured's ulterior motive in misrepresenting material facts is irrelevant. (*Cummings v. Fire Ins. Exchange, supra,* 202 Cal.App.3d at p. 1418.) The prosecution need not prove the legal obligation of the insurer. (*People v. Turley* (1953) 119 Cal.App.2d 632, 636.)

"The basis of the offense alleged is the defendant's intent to defraud which intent obviously does not depend solely upon the legal obligation, if any, arising out of the insurance contract." (*Ibid*.) The filing of claims for identical losses with two insurers with the intent to be paid in full by both insurers is evidence of intent to defraud. (*People v. Petsas* (1989) 214 Cal.App.3d 70, 77-78.) Intent to defraud does not require reliance by the person intended to be defrauded as does actual fraud. (*People v. Reed* (1961) 190 Cal.App.2d 344, 353.)

In this case, the evidence, together with reasonable inferences, established that defendant filed virtually identical claims for the 1995 water damage with both Kemper and Alpine with the intent to be paid in full by both insurers. In his dealings with Kemper, he concealed and affirmatively misrepresented his ongoing relationship with the builder. He told Kemper he did not know the identity of the builder or his whereabouts. Defendant conceded he lied to Kemper concerning his knowledge of Fishburn, but asserted he did this to protect Fishburn. The jury need not have believed his disclaimer and, in any event, an ulterior motive does not absolve defendant from liability. In his dealings with Alpine, he affirmatively misrepresented that he had not made a claim against his homeowner's insurance carrier and refused to tell Alpine the name of his insurer. This constitutes substantial evidence of an intent to defraud by recovering in full from both policies. It is clear that defendant did everything he could to ensure the two insurers did not become aware of the two separate claims. The fact that Kemper discovered the misrepresentation and concealment on its own does not affect defendant's intent to defraud.

Defendant constructs a complex argument concerning the relationship between insurers and tortfeasors, and quotes the policy language concerning Kemper's right of subrogation against Kemper. Defendant made these same arguments in the trial court; neither the jury nor the trial judge were persuaded. We are similarly unpersuaded. The legal obligation of the insurer under the policy is not an element of insurance fraud.

II. Instructional Error

A. Failure to Define "Material"

Defendant was charged in count 5 with a violation of Penal Code section 550, subdivision (a)(2): "It is unlawful to . . . [k]knowingly present multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, with an intent to defraud."

The trial court instructed the jury as to count 5 in the language of CALJIC No. 15.40 as follows: "Defendant is accused in count[] . . . five of having violated [section] 550[, subdivision (a)(2)] of the Penal Code, a crime. [¶] Every person who with specific intent to defraud knowingly presents multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, is guilty of a violation of Penal Code [s]ection 550[, subdivision (a)(2)]. [¶] In order to prove this crime, each of the following elements must be proved: [¶] One, a person knowingly presented multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer. [¶] And two, that person acted with the specific intent to [de]fraud." CALJIC No. 15.40 refers to CALJIC No. 15.26 for a definition of "intent to defraud."

The trial court instructed the jury as to "intent to defraud" as follows: "An intent to defraud is an intent to deceive another for the purpose of gaining some material advantage over that company or to induce that company to part with property or to alter that company's position to its injury or risk, and to accomplish that purpose by some false statement, false [representation] of fact, wrongful concealment or suppression of truth, or by any other artifice or act designed to deceive. [¶] If you find that [defendant] in making his insurance claim[] in count[] . . . five . . . , with the criminal intent to defraud failed to communicate to his insurer in good faith all the facts within his knowledge that were material to any insurance policy to which [defendant] was a policyholder, and that he believed to be material to such policy, such concealment is

wrongful as that phrase is meant in the above paragraph." This instruction was based on the language of CALJIC No. 15.26. The word "material" is not defined in CALJIC. Defendant did not request a definition of the word "material."

Defendant contends the trial court erred when it failed to instruct the jury sua sponte as to the meaning of the word "material." He argues the trial court should have defined the word "material" as "reasonably relevant to the claim or investigation of the claim and a reasonable insurer would attach importance to it." (*Cummings v. Fire Ins. Exchange, supra,* 202 Cal.App.3d at pp. 1416-1417; Pen. Code, former § 550, subd. (g).) We disagree.

First, the word material is not an element of a violation of Penal Code section 550, subdivision (a)(2), it is simply a word used in the instruction defining "intent to defraud," which is a statutory element. (Compare *People v. Gillard* (1997) 57 Cal.App.4th 136, 151-152 [material misstatement an element of the crime].) Accordingly, the trial court had no sua sponte duty to instruct as to the definition of "material." If defendant thought the word needed further definition, he should have requested further explanation, amplification or clarification and did not do so. Defendant has waived his right to assert this error on appeal. (*People v. Anderson* (1966) 64 Cal.2d 633, 639.)

Second, the word "material" has no technical meaning peculiar to the law. (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1495-1496 [CALJIC No. 2.21.2].) It is a word of common usage meaning relevant, pertinent or important. (*Ibid*. [substantial, essential, relevant, pertinent].) Indeed, "relevant" and "important" are the definitions defendant asserts the trial court should have given to the jury. There is no further definition of "material" in CALJIC, leading one to conclude the drafters did not consider such an instruction as necessary. Thus, the trial court had no sua sponte duty to define the word "material" in the "intent to defraud" instruction. (*People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.)

Third, within the context of the instruction the word "material" clearly means to gain a significant advantage over the insurer, to induce the insurer to part with property,

or to induce the insurer to alter its position to its injury or risk. Thus, there was no possibility of jury confusion.[2]

We conclude there was no instructional error.[3]

B. Inclusion of Concealment

Defendant contends the trial court erred by including in the "intent to defraud" instruction "wrongful concealment or suppression of truth" and "[defendant] . . . with the criminal intent to defraud, failed to communicate . . . in good faith all the facts within his knowledge that were material to any insurance policy to which [defendant] was a policyholder, and that he believed to be material to such policy, such concealment is wrongful as that phrase is meant in the above paragraph." Defendant argues that this language permitted him to be improperly convicted of insurance fraud for merely violating the contractual implied covenant of good faith and fair dealing. (See *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 400.) Defendant further argues an intent to defraud cannot be based on an omission, concealment, or suppression.

We disagree with defendant's interpretation of the instructions. The jury found defendant guilty of a violation of Penal Code section 550, subdivision (a)(2). They found defendant presented claims for the same loss to both Kemper and Alpine. They also found defendant intended to defraud Kemper and Alpine by collecting in full from both insurers. This intent to defraud was evidenced by both actual misrepresentations to

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[2] Defendant also argues the evidence is insufficient to support a finding that defendant made a material misstatement. However, the jury was not required to make this finding. The jury was required to find that defendant intended to defraud. As we have discussed, substantial evidence supports a finding of intent to defraud.

[3] Defendant asserts in his reply brief that the instruction was misleading when it referred to "material" to the "policy," instead of "material" to the "claim." In context, we do not believe the jury would have been misled.

Kemper and Alpine, as well as concealment and suppression of the truth. Defendant was found guilty because he had the specific intent to defraud Kemper and Alpine, not because he violated the contractual implied duty of good faith and fair dealing. The trial court instructed the jury that intent to defraud could be accomplished by wrongful concealment. The trial court further instructed the jury that wrongful concealment includes a failure to communicate material facts. This is, of course, a classic definition of intent to defraud. Implicit in this definition is a conclusion that the insured has a contractual duty to the insurer to volunteer material information. There is nothing new or startling in this conclusion. Actual misrepresentations are not the only means of perpetrating a fraud. (*Agricultural Ins. Co. v. Superior Court, supra,* 70 Cal.App.4th at p. 402.) Indeed, the addition of the words "in good faith" was unnecessary in the instruction and arguably increased the burden on the prosecution.

The case defendant relies on for his argument is *Agricultural Ins. Co. v. Superior Court, supra,* 70 Cal.App.4th 385. In that case, this appellate district held that an insurer could not state a tort cause of action against its insured for bad faith, but only a breach of contract cause of action. The court also held that there was no private right of action under Penal Code section 550. The court further held, however, that an insurer could state a cause of action against its insured for fraud. "The fraud claim presents a question separate from the bad faith question. The relatively modern concept of 'bad faith' is quite indistinct, and can mean many different things to different people. The relatively ancient concept of fraud, by contrast, is far more well-defined and, consequently, far more circumscribed." (*Id*. at p. 401.) "Civil Code section 1572 provides: 'Actual fraud . . . consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: [¶] 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; [¶] 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; [¶] 3. The suppression of that which is true, by one having knowledge or belief of

the fact; [¶] . . . or, [¶] 5. Any other act fitted to deceive.' This statutory definition of actual fraud encompasses claims of the type advanced by [insurer], and includes fraudulent misrepresentations made 'by a party to the contract.' It follows that fraud can be committed by a party to the contract during the insurance claims process." (*Ibid*.)

The elements of a fraud claim include misrepresentation (false representation, concealment or nondisclosure), knowledge of falsity, and intent to defraud, i.e., to induce reliance. (*Agricultural Ins. Co. v. Superior Court, supra,* 70 Cal.App.4th at p. 402.) "The element of intent makes the fraud actionable regardless of any contractual or fiduciary duty one party might owe to the other." (*Ibid*.)

Here, the trial court correctly instructed the jury as to the meaning of "intent to defraud" per CALJIC No. 15.26. The standard instruction includes the term "wrongful concealment." The trial court modified the standard instruction to include an explanation of the term "wrongful concealment" as a knowing failure of defendant to disclose material facts to the insurers. We conclude there was no instructional error.

III. Prosecutorial Misconduct

Defendant contends prosecutorial misconduct requires reversal. We disagree.

During cross-examination of a witness, defense counsel referred to pretrial plea negotiations, in which the prosecution had offered defendant a guilty plea under favorable terms, provided defendant agreed to repay Kemper its costs of investigation ($450,000) and pay a substantial fine ($450,000). Defense counsel suggested this conduct had been extortion on the part of Kemper and the prosecution. The prosecution objected and defense counsel agreed he would not refer to this topic again. Nevertheless, defense counsel again referred to the proposed plea agreement. Without pausing to think, the prosecutor retorted angrily that defendant had been ready to plead guilty to this so-called extortionate plea offer. All of this occurred before the jury. The prosecutor's statement had been based on the presentation of the offer to defense counsel and defense

counsel's willingness to present the offer to defendant. However, before defendant could accept or reject the offer, the prosecution withdrew the offer in light of the new charges arising out of the disability insurance claim.

The trial court and counsel engaged in substantial discussion about this issue. The prosecutor readily admitted his comment had been improper and agreed to apologize to the jury. Finally, defense counsel requested a mistrial with prejudice. The trial court denied this motion on the ground the misconduct had been an angry impulse in response to defense counsel's improper references to settlement negotiations and not intentional, deliberate, or in bad faith. The trial court also found the prosecution had not attempted to obtain any tactical benefit from a mistrial. Defense counsel expressly did not request a mistrial and new trial. However, the trial court indicated it would have denied such a motion, if made. Defense counsel also expressly did not request an admonition at that time. Defendant testified that he had never been willing to plead guilty to any charge.

At the end of the trial, defense counsel requested an admonition, which would have included a statement that the prosecutor had lied and defendant had never intended to plead guilty to any charges. The trial court refused to give such an admonition, but admonished the jury as follows: "Certain questions were asked and one statement was made by counsel concerning settlement negotiations that may have occurred in this case. I have sustained the objection to the statement and the question. They are not evidence in this case and should not be considered by you for any reason. [¶] In an attempt to resolve criminal cases without the necessity of trials, both sides in criminal cases often take preliminary positions which are solely for the purpose of negotiations and should not be held against either side unless they actually settle the case. [¶] The law makes evidence of such unsuccessful negotiations inadmissible in any legal proceeding of any nature. The statement in particular should not have been made and I direct you to disregard it as though you had never heard of it."

Evidence of a defendant's willingness to plead guilty is inadmissible. (Evid. Code, § 1153; Pen. Code, § 1192.4.) Accordingly, the prosecutor's statement was

inadmissible, objectionable, and improper. (*People v. Tanner* (1975) 45 Cal.App.3d 345, 349-352; *People v. Magana* (1993) 17 Cal.App.4th 1371, 1377.) The question remains as to whether the statement constituted reversib1e misconduct.

Conduct of a prosecutor that does not render a criminal trial fundamentally unfair is not prosecutorial misconduct, unless it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury of a certain issue of fact. (*People* v. *Espinoza* (1992) 3 Cal.4th 806, 820; *People* v. *Haskett* (1982) 30 Cal.3d 841, 866; *People* v. *Pitts* (1990) 223 Cal.App.3d 606, 691.)

Prosecutorial misconduct will not result in a reversal, unless it is reasonably probable that a result more favorable to the defendant would have been obtained in the absence of the misconduct. (*People* v. *Milner* (1988) 45 Cal.3d 227, 245; *People* v. *Bolton* (1979) 23 Cal.3d 208, 214.) Cautionary instructions by the trial court are generally deemed effective in counteracting any prejudice from counsel's statements. (*People* v. *Perry* (1972) 7 Cal.3d 756, 791.) We must presume that the jury has followed the trial court's instructions. (*People* v. *Harris* (1981) 28 Cal.3d 935, 951.) Only in extreme situations would a trial court be deemed unable to correct the impropriety of an act of counsel and unable to remove the effect of any offending comments by instructing the jury to disregard the comments. (See *People* v. *Fitzgerald* (1972) 29 Cal.App.3d 296, 312.)

We conclude that the isolated improper statement by the prosecutor does not constitute reversible misconduct. There was no egregious pattern of misconduct rendering the trial fundamentally unfair. The statement was provoked by improper conduct on the part of defense counsel. The statement was an angry response and not deliberate misconduct. A mistrial would have given the prosecution no tactical advantage. Defendant testified without objection that he had never been ready or willing to plead guilty. This testimony was unchallenged and uncontroverted, and the prosecutor never mentioned the issue in argument to the jury. The trial court carefully admonished the jury to disregard the statement. The jury acquitted defendant of 10 of 12 counts and

hung on another count, leading to the conclusion that the jury followed the trial court's instruction. Defendant was not prejudiced by the statement. (Compare *People v. Tanner, supra,* 45 Cal.App.3d at pp. 348-354 [admission of plea negotiations as evidence of guilt; defense counsel prevented from presenting evidence of context; *Standen v. Whitley* (9th Cir. 1993) 994 F.2d 1417, 1421 [trial court instructed jury it could consider the defendant's withdrawn guilty plea as evidence of guilt].)

IV. Psychotherapist-Patient Privilege

Defendant contends the trial court erred when it permitted the prosecution to present evidence of his statements to two independent medical examiners (psychotherapists) retained by Provident to investigate his claim for psychiatric disability benefits. He asserts this violated his psychotherapist-patient privilege.[4] We conclude defendant impliedly waived the privilege and any error was harmless.

Defendant made a claim with Provident for psychiatric disability. He claimed he was totally disabled due to clinical depression. He sought $15,000 per month in disability payments. The claim was supported by the reports of defendant's treating psychiatrist, Dr. Rudnick. As permitted under the disability insurance policy, Provident requested that defendant submit to examination by two independent medical examiners. Before the examinations, the two psychotherapists advised defendant the examination would not be confidential, but would be reported to Provident. Defendant attempted to limit the waiver of his psychotherapist-patient privilege to Provident only. The two psychotherapists reported to Provident that defendant was malingering and was not disabled by depression. Provident reported the suspected insurance fraud to the district

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[4] For the first time on appeal, defendant raises the physician-patient privilege. (Evid. Code, § 994.) This privilege is inapplicable in criminal proceedings. (Evid. Code, § 998.) Assuming the existence of this privilege would give rise to a different result, we conclude defendant may not raise this issue for the first time on appeal.

attorney and gave the district attorney the reports of the two psychotherapists.

At the preliminary hearing, defendant waived the psychotherapist-patient privilege as to Drs. Rudnick, Evans, and Moss. Defendant attempted to limit the waiver to the preliminary hearing only. Dr. Rudnick testified at the preliminary hearing. The reports of Drs. Evans and Moss were received into evidence. At trial, defendant waived the privilege as to Dr. Rudnick. Defendant attempted to claim the privilege to prevent the testimony of Drs. Evans and Moss. The trial court ruled that the privilege had been impliedly waived and permitted the testimony of the two psychotherapists. We agree with the trial court.[5]

Confidential communications made by a patient to a psychotherapist for treatment or diagnosis are privileged. (Evid. Code, § 1012.) The privilege may be waived by voluntary disclosure or by the patient tendering his or her mental state. (Evid. Code, § 912; *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1087.) By submitting a claim for psychiatric disability to Provident supported by the report of Dr. Rudnick, defendant waived the privilege as to Dr. Rudnick for purposes of the disability claim. Defendant waived the privilege repeatedly as to Dr. Rudnick, including at the preliminary hearing and at trial. Defendant also waived the privilege as to Drs. Evans and Moss by acknowledging that the examinations were not confidential and would be reported to Provident. The insurance fraud charges in count 12 arose out of defendant's alleged fraudulent conduct in connection with his insurance claim for psychiatric disability. Although defendant did not expressly waive the privilege in connection with the criminal charges and indeed attempted to claim the privilege, he impliedly waived the privilege by his previous conduct—his claim for psychiatric disability, his express waiver as to Dr. Rudnick, his express waiver for purposes of reporting to Provident as to Drs. Evans and Moss, and his express waiver as to Drs. Evans and Moss at the preliminary hearing. The criminal prosecution arose out of the identical claim for

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5 Defendant did not ask the trial court to limit the testimony of Drs. Evans and Moss to count 12.

psychiatric disability, for which defendant had waived the privilege. The trial court properly concluded that defendant could not waive the privilege whenever it was to his advantage to do so, but claim the privilege when that was in his best interest. That would be unfair.[6] (See *Jimerson v. Prendergast* (Colo. 1985) 697 P.2d 804, 806; *Starsight Telecast, Inc. v. Gemstar Development Corp.* (N.D. Cal. 1994) 158 F.R.D. 650, 653.)

In any event, the admission of the testimony of the two psychotherapists was harmless under any standard of review. A Provident employee testified without objection that Dr. Evans had reported to Provident that defendant was malingering. The jury did not convict defendant of insurance fraud arising out of the disability claim. The jury acquitted defendant of 10 counts. It is highly unlikely the psychotherapists' testimony that defendant was malingering on his psychiatric disability claim had any effect on the guilty verdict for filing the same 1995 water damage claim with multiple insurers with the intent to defraud.

V. Restitution

The trial court awarded restitution to Kemper in the amount of $100,000 for its costs of investigating the multiple water damage claims in 1995. (Pen. Code, § 1202.4, subd. (f).) The award was supported by a "Summary of Investigation Expenses" report prepared by Kemper. The report delineates the individual performing the work, the investigation activity, the date of the activity, the hourly rate of the individual, and the total hours worked. The dates were all on or after March 23, 1995. The hourly rate of Kemper investigators, claim handlers, and adjustors is $80. The hourly rate of

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[6] Defendant also asserts that the involuntary disclosure of his confidential communications with Drs. Evans and Moss violated his federal and state rights to privacy. This argument is unpersuasive. The testimony of the two psychotherapists was necessary to prove count 12 and the information was not otherwise available. (See *San Diego Trolley, Inc. v. Superior Court, supra,* 87 Cal.App.4th at p. 1095.) Also, the communications were never completely confidential.

consultants is $89.25 to $131.50. The hourly rate of outside counsel is $135. The total request was $122,257. The trial court struck approximately $22,000 of attorney's fees.

Defendant contends the trial court's restitution award is not supported by substantial evidence and constitutes an abuse of discretion. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992-993.) Defendant contends restitution may not be awarded for the victim's costs of investigating the fraud. Defendant also contends the amount is excessive.[7]

"In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (Pen. Code, § 1202.4, subd. (f).) Economic loss includes: "[P]rofits lost by the victim . . . due to time spent as a witness or in assisting the police or prosecution." (Pen. Code, § 1202.4, subd. (f)(3)(E).) An insurance company is a direct victim of insurance fraud. (*People v. O'Casey* (2001) 88 Cal.App.4th 967, 973; *People v. Moloy* (2000) 84 Cal.App.4th 257, 260-261.) A direct victim is entitled to recover as restitution out-of-pocket investigation expenses. (*People v. Ortiz* (1997) 53 Cal.App.4th 791, 797-798.) A restitution award may "include the reasonable value of employee work product lost as a result of the criminal conduct of another . . . ." (*In re Johnny M.* (2002) 100 Cal.App.4th 1128, 1134.)

Kemper provided the trial court with a summary of its costs for investigation of the 1995 water damage claim. It did not include costs for investigation of the 1994 earthquake damage claim. The trial court considered the summary, reduced it by more than $22,000, and awarded Kemper its costs of investigating the fraudulent multiple claims in 1995. The $100,000 award was supported by substantial evidence, and the trial court did not abuse its discretion. The amount relates only to count 5 and is not excessive. There was no need for the trial court to allocate the costs, since Kemper

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[7] Defendant also contends the investigation expenses should be offset by the value of the unpaid fraudulent water damage claim. To state the contention is to reject it.

provided costs relating only to count 5. Defendant's suggestion that the legitimate investigation consisted of only a single taped interview is unpersuasive.[8]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.

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[8] As to individual items on the summary, neither in the trial court nor in its briefs on appeal has defendant raised objections to specific items.